Majlis Peguam v Cecil Wilbert Mohanaraj Abraham

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(A)-130–01 OF 2017
TENGKU MAIMUN, NALLINI PATHMANATHAN AND MARY LIM JJCA
3 JULY 2018

Legal Profession — Disciplinary Board — Complaint against advocate to Disciplinary Board — Complaint dismissed by Disciplinary Board — Appeal to High Court was dismissed — Whether there was actual complaint within the meaning and purpose of s 99 read with ss 94 and 100 of the Legal Profession Act 1976 — Whether Disciplinary Board had jurisdiction to hear application by appellant — Whether direct evidence and circumstantial evidence established misconduct complained of — Whether court should intervene findings by Disciplinary Committee — Whether misconduct proven — Whether learned judge plainly wrong in affirming decision of Disciplinary Board — Legal Profession Act 1976 ss 94, 99, 100 & 103D

The late Balasubramaniam a/l Perumal ('Bala') was a prosecution witness in the murder trial of Altantuya Shaaribu. On 1 July 2008, Bala had signed a statutory declaration ('SD1') which was drafted by his solicitor, Americk Singh Sidhu ('Americk'). SD1 basically implicated Datuk Seri Najib Tun Razak in a relationship with Altantuya. Subsequently, Bala had signed another statutory declaration ('SD2') where he retracted the entire contents of SD1 and alleged that he was compelled to sign SD1 under duress. Nevertheless, in a video interview which was made public on or around 12 November 2009, Bala alleged that he signed SD2 under duress. Majlis Peguam ('the appellant') then lodged a complaint, vide a letter dated 4 April 2013 ('the letter') to the Disciplinary Board ('the DB') against the respondent for an alleged misconduct. In the letter, the appellant, inter alia, inquired whether the respondent had drafted or was involved in the drafting of SD2. The Chairman of the Disciplinary Committee ('the DC') found that the threshold of proving its case beyond reasonable doubt had not been reached by the appellant, as such, he recommended that no cause for disciplinary action existed. Having considered the DC's report on the complaint against the respondent, the DB, pursuant to s 103D of the Legal Profession Act 1976 ('the LPA'), ordered that the complaint be dismissed. On appeal, the High Court judge concluded that there was no reason to interfere with the decision of the DC and the DB. The appellant's appeal was accordingly dismissed, hence the present appeal. In the present appeal, the appellant submitted that: (a) the DC/DB and the learned judge failed to critically evaluate the direct and circumstantial evidence; (b) the respondent had admitted on two occasions to drafting SD2; and (c) the High

Court had failed to consider the exception set out in the case of *Majlis Peguam v Dato' Sri Dr Muhammad Shafee Abdullah* [2016] 5 MLJ 572 ('Shafee's case'). In response, the respondent submitted that: (i) the complaint involved an allegation of fact and issues of credibility of witnesses; and (ii) there were material discrepancies and inconsistencies in the evidence and that there was a complete lack of evidence adduced by the appellant before the DC. The respondent had also raised a preliminary point that the complaint against the respondent was not a complaint within the meaning of the law, namely s 99 of the LPA; the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 and the Legal Profession (Disciplinary Proceedings) (Appeal) Rules 1994.

Held, dismissing the appeal with no order as to costs:

(1) From the contents of the letter, the court found no actual complaint or allegation or assertion of any facts pointing to any misconduct of the respondent in relation to SD2. Rather, by the said letter, the appellant was in effect seeking to obtain information. Therefore, the court was no convinced that the letter and its appendices comprised a complaint within the meaning and purpose of s 99 read with ss 94 and 100 of the LPA and the relevant Disciplinary Rules. On that ground alone, the appeal could not be sustained as it was questionable whether there was a valid complaint (see paras 34 & 37).

(2) The DB's powers to inquire into a written application or complaint under s 100 of the LPA was necessarily confined to any complaint made under s 99 of the LPA. This was because the disciplinary process under the LPA may only be initiated by way of complaint under s 99 of the LPA. The reference to a written 'application' in s 100 of the LPA and the ensuing provisions were, for all intents and purposes, of no effect. Since the DB in fact lacked jurisdiction to hear any application, which was the real intent of complaint of 4 April 2013, the DB ought to have dismissed the 'complaint' in limine under s 100(1)(a) of the LPA (see paras 38 & 51).

(3) The court found that the circumstantial evidence did not establish the misconduct complained of. Further, the direct evidence was insufficient to meet the burden of proving the complaint of misconduct, even on a balance of probabilities, let alone beyond reasonable doubt, the standard of proof to be met by the appellant. The appellant's case rested essentially on the allegations made by Americk and the evidence of Tommy Thomas on the purported confession/admission made by the respondent that he drafted SD2. The DC preferred the evidence of everyone else, including that of the respondent over the evidence of Tommy Thomas and Americk. The court found no basis to intervene and no reason to depart. The court certainly did not have the audio-visual advantage that the DC

enjoyed when deciding unanimously which witnesses' testimony they preferred (see paras 55–56, 58 & 62).

(4) The evidence against the respondent was inconclusive and largely hearsay and did not meet the required standard of proof. Given the evidence of Christopher Leong that mere drafting of SD2 itself was not a misconduct under the LPA and that the appellant was being 'used', and in the light of the real agenda of Americk in revealing the issue of SD2, the court found that the evidence was unsafe to warrant a finding of misconduct within s 94 of the LPA against the respondent, even assuming for a moment that the drafting of the SD may amount to misconduct (see para 63).

(5) This was not a rare case where the court was constrained to intervene to reverse the findings of the High Court which had affirmed the DB's decision. This case was not an exception as was found by the Federal Court in the *Shafee*'s case. It ought to be borne in mind that in the present case, 20 members cumulatively of the DC and the DB who were the respondent's peers had found that no cause of disciplinary action existed against the respondent. As stated by the Federal Court in *Dinesh Kanavaji a/l Kanawagi & Anor v Ragumaren a/l N Gopal (Majlis Peguam, intervener)* [2018] 2 MLJ 265, the court can only intervene where the findings are manifestly perverse; where the DC/DB had failed as right-thinking members of the Bar to give due consideration to the facts of the case and the conduct of the solicitors concerned; and where there had been a breach of natural justice. None of the above grounds were present in the instant appeal, hence, the court was not satisfied that the learned judge was plainly wrong in affirming the decision of the DB (see paras 64 & 66–67).

[Bahasa Malaysia summary

Mendiang Balasubramaniam a/l Perumal ('Bala') adalah saksi pendakwaan dalam percubaan pembunuhan Altantuya Shaaribu. Pada 1 Julai 2008, Bala telah menandatangani akuan berkanun ('SD1') yang digubal oleh peguamnya, Americk Singh Sidhu ('Americk'). SD1 pada dasarnya melibatkan Datuk Seri Najib Tun Razak dalam hubungan dengan Altantuya. Selepas itu, Bala telah menandatangani satu lagi akuan berkanun ('SD2') di mana dia telah menarik balik keseluruhan kandungan SD1 dan mendakwa bahawa dia terpaksa menandatangani SD1 di bawah tekanan. Walau bagaimanapun, dalam satu temu bual video yang telah disiarkan kepada umum pada atau sekitar 12 November 2009, Bala mendakwa bahawa dia telah menandatangani SD2 di bawah tekanan. Majlis Peguam ('perayu') kemudian membuat aduan, melalui surat bertarikh 4 April 2013 ('surat') kepada Lembaga Tatatertib ('LT') terhadap responden atas salah laku yang dikatakan. Dalam surat itu, perayu, antara lain, menyoal sama ada responden telah merangka atau terlibat dalam membuat SD2 itu. Pengerusi Jawatankuasa Tatatertib ('JT') mendapati bahawa ambang membuktikan kesnya melampaui keraguan munasabah tidak

tercapai oleh perayu, dengan itu, beliau mengesyorkan bahawa tidak ada sebab untuk tindakan tatatertib wujud. Setelah mempertimbangkan laporan JT mengenai aduan terhadap responden, LT, menurut Akta Profesyen Undang-Undang 1976 ('APU'), memerintahkan supaya aduan itu ditolak. Atas rayuan, hakim Mahkamah Tinggi membuat kesimpulan bahawa tidak ada alasan untuk mengganggu keputusan JT dan LT. Rayuan perayu sewajarnya diberhentikan, oleh itu rayuan sekarang. Dalam rayuan kini, perayu mengemukakan bahawa: (a) JT/LT dan hakim yang bijaksan gagal menilai secara kritikal keterangan secara langsung dan mengikut keadaan itu; (b) responden telah mengaku dua kali merangaka SD2 itu; dan (c) Mahkamah Tinggi gagal untuk mempertimbangkan pengecualian yang dinyatakan dalam kes *Majlis Peguam v Dato 'Sri Dr Muhammad Shafee Abdullah* [2016] 5 MLJ 572 ('kes Shafee'). Sebagai maklum balas, responden mengemukakan bahawa: (i) aduan itu melibatkan dakwaan fakta dan isu kredibiliti saksi; dan (ii) terdapat percanggahan dan ketidakkonsistenan material dalam keterangan dan bahawa terdapat kekurangan bukti keterangan yang dikemukakan oleh perayu di hadapan JT. Responden juga telah mengemukakan poin awal bahawa aduan terhadap responden bukanlah aduan dalam pengertian undang-undang, iaitu s 99 APU; Peraturan Profesion Undang-Undang (Tatatertib Tatatertib) (Kaedah Pemeriksaan Tribunal dan Tatatertib) 1994 dan Peraturan Profesion Undang-Undang (Tatatertib Tatatertib) (Rayuan) 1994.

Diputuskan, menolak rayuan tanpa perintah untuk kos

(1) Berdasarkan kandungan surat itu, mahkamah tidak mendapati sebarang aduan atau tuduhan atau dakwaan yang sebenarnya terhadap apa-apa fakta yang menunjukkan kepada salah laku responden berkaitan SD2. Sebaliknya, melalui surat tersebut, perayu berusaha untuk mendapatkan maklumat. Oleh itu, mahkamah tidak yakin bahawa surat itu dan lampirannya mengandungi aduan dalam maksud dan tujuan s 99 dibaca bersama ss 94 dan 100 APU dan Peraturan Tatatertib yang berkaitan. Atas alasan itu sahaja, rayuan itu tidak dapat dikekalkan kerana ia boleh dipersoalkan sama ada terdapat aduan yang sah (lihat perenggan 34 & 37).

(2) Kuasa LT untuk menjalankan siasatan mengenai sesuatu permohonan atau aduan bertulis di bawah s 100 APU semestinya terhad kepada apa-apa aduan yang dibuat di bawah s 99 APU. Ini adalah kerana proses disiplin di bawah APU hanya boleh dimulakan melalui aduan di bawah s 99 APU. Rujukan kepada 'permohonan' bertulis dalam s 100 APU dan peruntukan berikutnya adalah, untuk semua maksud dan tujuan, tidak berkuatkuasa. Oleh kerana LT sebenarnya tidak mempunyai bidang kuasa untuk mendengar apa-apa permohonan, yang merupakan maksud sebenar aduan pada 4 April 2013, LT sepatutnya telah menolak 'aduan' in limine di bawah s 100(1)(a) APU (lihat perenggan 38 & 51).

(3) Mahkamah mendapati bahawa keterangan mengikut keadaan tidak membuktikan salah laku yang diadukan. Selanjutnya, keterangan secara langsung tidak mencukupi untuk memenuhi beban membuktikan aduan salah laku, walaupun atas imbangan kebarangkalian, apatah lagi melampaui keraguan munasabah, piawai bukti yang harus dipenuhi oleh perayu. Kes perayu terletak pada dakwaan yang dibuat oleh Americk dan keterangan Tommy Thomas berhubung pengakuan/pengakuan yang dibuat oleh responden yang dia telah membuat SD2 itu. JT lebih menerima bukti orang lain, termasuk responden mengenai keterangan Tommy Thomas dan Americk. Mahkamah mendapati tiada asas untuk campur tangan dan tidak ada sebab untuk memutuskan sebaliknya. Mahkamah sudah tentu tidak mempunyai kelebihan audio-visual yang dinikmati oleh JT ketika memutuskan dengan suara bulat keterangan saksi yang lebih diterima (lihat perenggan 55–56, 58 & 62).

(4) Keterangan terhadap responden adalah tidak meyakinkan dan sebahagian besarnya dengar cakap dan tidak memenuhi piawai bukti yang dikehendaki. Memandangkan keterangan Christopher Leong bahawa pembuatan SD2 itu sendiri bukan salah laku di bawah APU dan bahawa perayu telah 'digunakan', dan berdasarkan agenda sebenar Americk dalam mendedahkan isu SD2, mahkamah mendapati bahawa keterangan itu tidak selamat untuk mewajarkan penemuan salah laku dalam s 94 APU terhadap responden, walaupun dengan anggapan seketika bahawa pembuatan SD itu boleh dianggap sebagai salah laku (lihat perenggan 63).

(5) Ini bukan satu kes yang jarang berlaku di mana mahkamah telah dikekang untuk campur tangan untuk mengkas dapatan Mahkamah Tinggi yang telah mengesahkan keputusan LT. Kes ini bukan pengecualian seperti yang diputuskan oleh Mahkamah Persekutuan dalam kes Shafee. Perlu diingat bahawa dalam kes ini, 20 orang secara kumulatif dari JT dan LT yang menjadi rakan sekerja responden mendapati bahawa tidak ada sebab tindakan tatatertib yang wujud terhadap responden. Sepertimana dinyatakan oleh Mahkamah Persekutuan dalam kes *Dinesh Kanavaji a/l Kanawagi & Anor v Ragumaren a/l N Gopal (Majlis Peguam, pencelah)* [2018] 2 MLJ 265, mahkamah hanya boleh campur tangan di mana penemuan itu secara terang-terangan jahat; di mana JT/LT telah gagal sebagai ahli-ahli yang mempunyai pemikiran yang betul dalam Majlis untuk memberi pertimbangan sewajarnya kepada fakta kes dan perlakuan peguam-peguam yang berkenaan; dan di mana terdapat pelanggaran keadilan semula jadi. Tiada alasan di atas wujud dalam rayuan ini, justeru, mahkamah tidak berpuas hati bahawa hakim yang bijaksana jelas terkhilaf dalam mengesahkan keputusan LT tersebut (lihat perenggan 64 & 66–67).]

Notes

For a case on complaint against advocate to Disciplinary Board, see 9 *Mallal's Digest* (5th Ed, 2018 Reissue) para 1548.

Cases referred to

Abidin Daver, The [1984] AC 398, HL (refd)
Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770, CA (refd)
Bolton v Law Society [1994] 1 WLR 512, CA (refd)
Browne v Dunn (1893) 6 R 67, HL (refd)
Campbell v Hamlet [2005] 3 All ER 1116, PC (refd)
Chan Yiew Hock v Koh Hong Toong & Anor; Majlis Peguam (intervener) [2010] MLJU 2229; [2011] 4 CLJ 160, HC (refd)
Dinesh Kanavaji a/l Kanawagi & Anor v Ragumaren a/l N Gopal (Majlis Peguam, intervener) [2018] 2 MLJ 265, FC (refd)
Gana Muthusamy v LM Ong & Co [1998] 3 MLJ 341; [1998] 4 CLJ 878, CA (refd)
Lembaga Tatatertib Peguam-Peguam v Hoo Lin Coln & Anor [2008] 4 MLJ 1, FC (refd)
Majlis Peguam v Dato Sri Dr Muhammad Shafee Abdullah [2016] 5 MLJ 572, FC (refd)
Marzaini bte Zainuddin v Majlis Peguam Negara [2007] 8 MLJ 697, HC (refd)

Legislation referred to

Advocates and Solicitors Ordinance 1947 Part III
Legal Profession (Disciplinary Proceedings) (Appeal) Rules 1994
Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994
Legal Profession (Publicity) Rules 2001
Legal Profession Act 1976 ss 93, 94, 94(1), 96, 96(4), 97, 98, 99, 99(1), 100, 100(1), (2), (2)(a), 101, 101(1)(a), 102, 103, 103A, 103B, 103C, 103D, 103E, 103F, 103G, 104(1), Part VII

Appeal from: Originating Summons No WA-17D-15–04 of 2016 (High Court, Kuala Lumpur)

Bastian Vendargon (Lai Chee Hoe, Lim Soo Ching and Anne Verdargon with him) (Chee Hoe & Assoc) for the appellant.
Rishwant Singh (Shahul Hameed Amirudin with him) (Cecil Abraham & Partners) for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

INTRODUCTION

[1] This was an appeal by the appellant/Bar Council against the decision of the High Court in dismissing the appellant's appeal against the decision of the disciplinary board ('the DB'). The DB had dismissed the appellant's complaint against the respondent, an advocate and solicitor.

[2] We had unanimously dismissed the appeal. We now give our reasons.

BACKGROUND FACTS

[3] The late Balasubramaniam a/l Perumal ('Bala') was a prosecution witness in the murder trial of Altantuya Shaaribuu ('Altantuya'). On 1 July 2008, Bala signed a statutory declaration ('SD1') where he had, inter alia, implicated Datuk Seri Najib Tun Razak ('Datuk Seri Najib') in a relationship with Altantuya. At all material times, Americk Singh Sidhu ('Americk') was Bala's solicitor and Americk had drafted SD1 on Bala's instructions. SD1 was made known to the public via a press conference held on 3 July 2008.

[4] On 4 July 2008, Bala signed another statutory declaration ('SD2') where he retracted the entire contents of SD1 and where he alleged that he was compelled to sign SD1 under duress. SD2 was made known to the public through a press conference on 4 July 2008.

[5] In a three part video interview which was made public on or around 12 November 2009, Bala alleged that he signed SD2 under duress.

[6] On or around 12 December 2012, in a video interview with TV Pas, Deepak Jaikishan ('Deepak') identified the solicitors involved in the preparation of SD2. TV Pas had deleted/muted the sound track from that portion of the video interview wherein Deepak had apparently disclosed the name(s) of the solicitor(s).

[7] Following Deepak's video interview, there was speculation and allegation in various media of the respondent's involvement with regard to the preparation of SD2.

[8] On 14 December 2012, at Renaissance Hotel Kuala Lumpur, in the presence of the respondent's wife; Tommy Thomas and his wife; Lim Chee Wee; Darryl Goon and his wife and Dato' Johari Razak and his wife, the respondent had allegedly confirmed that he had drafted SD2 or had been involved with its drafting.

[9] On 21 January 2013, the appellant wrote to the respondent and Sunil Abraham ('Sunil') to enquire whether they had any knowledge of the allegations made with regard to the preparation of SD2. The relevant part of the letter reads:

> As both of you may be aware, ... there had been speculation and allegations in various media, of your involvement with regard to the preparation of the SD2.
>
> In view of the allegations of potential misconduct, we are duty bound to enquire into whether any aspects of the matter have any implications on any issue of professional misconduct.
>
> As such, we would be obliged if you could furnish us with any information with regard to the preparation of SD2 and whether you have any knowledge of the same.

[10] Vide a letter dated 23 January 2013, the solicitors acting for the respondent and Sunil informed the appellant that their clients were unable to assist the appellant's enquiries by reason of solicitor-client privilege. Thereafter, between February to April 2013, further correspondence ensued between the appellant and the respondent's solicitors pertaining to the issue of solicitor-client privilege.

[11] On or around 22 February 2013, it was reported that Deepak had commenced legal action against Datuk Seri Najib and that the respondent was identified in the statement of claim as one of the solicitors involved in the drafting and preparation of SD2. On 11 March 2013, the appellant wrote to Sivarasa a/l Ramiah, Deepak's solicitor, requesting for a copy of the statement of claim and for confirmation on how Deepak was aware of the identity of the solicitors who prepared the SD2. The case by Deepak against Datuk Seri Najib was withdrawn before the close of pleadings and the confirmation sought for by the appellant from Deepak, was not forthcoming.

[12] On 17 March 2013, in the news report appearing in *Malaysiakini*, it was reported that Americk had disclosed to the Malaysian Bar at the Malaysian Bar's Annual General Meeting held on 16 March 2013 ('the AGM') that two weeks prior to the AGM, he met the respondent and in that meeting which was also attended by Saheran Suhendran Sockanathan ('Socks'), the respondent admitted that he drafted SD2 on the instructions of Datuk Seri Najib, the Prime Minister. The respondent had purportedly apologised for it to Americk.

[13] On 27 March 2013, Socks affirmed a statutory declaration stating as follows:

> 1. I met with Mr Americk Sidhu ('Americk') for lunch on about 27 February 2013. He told me that his client Mr Balasubramaniam ('Bala') was considering filing a police report in relation to the Second Statutory

Declaration affirmed by him on 1 July 2008 ('SD2'), which could implicate Tan Sri Dato' Cecil Abraham ('Tan Sri Cecil') and Mr Sunil Abraham.

2. At about 9.15 am the following morning, I met with Tan Sri Cecil at the Kuala Lumpur City Centre and told him that Americk informed me that Bala was considering filing the said police report. I asked whether he would be prepared to meet Americk on a private and strictly confidential basis. Tan Sri Cecil agreed.

3. At about 11 am that morning, Tan Sri Cecil, Americk and I met at Jarrod & Rawlins at the AmpWalk Mall on Jalan Ampang, a restaurant near Americk's office. The meeting lasted about 20-30 minutes. Only the 3 of us were present throughout the meeting.

4. I hereby state that in the course of this meeting:

4.1 at no time did Tan Sri Cecil say that he had personally drafted SD2;

4.2 at no time did Tan Sri Cecil say that he had drafted SD2 on the instructions of the Prime Minister or that the Prime Minister was his client.

THE COMPLAINT

[14] Vide a letter dated 4 April 2013 to the Director of the DB, the appellant lodged a complaint against the respondent in the following terms:

Complaint against Cecil Wilbert Mohanaraj Abraham of Zul Rafique & Partners

1. We wish to lodge a complaint for the Disciplinary Board's investigation against Cecil Wilbert Mohanaraj Abraham (CA)

...

2. The facts and chronology leading to the complaint against CA and the documents referred to in it are the enclosed bundle marked 'Appendix A'.

3. In view of the said facts and chronology, and the documents referred to therein, we request the Disciplinary Board to formally investigate —

3.1 Whether CA drafted or was responsible for or involved in the drafting of the statutory declaration signed by one Balasubramaniam a/l Perumal (Bala) on 4 July 2008 (SD2) to retract a previous statutory declaration drafted by Bala's lawyer, and signed by Bala on 1 July 2008 (SD1);

3.2 If CA drafted or was responsible for or involved in the drafting of SD2, the circumstances in which SD2 was signed by Bala before the Commissioner for Oaths, Zainal Abidin bin Muhayat, including –

(a) Whether CA met or was instructed by Bala, in regard to the drafting of SD2;

(b) Whether CA knew or had reason to believe that Bala was at the

material time represented by a lawyer with respect to matters addressed in or relating to or connected with SD2, bearing in mind that Bala was represented by a lawyer with respect to SD1 which was sought to be contradicted by SD2;

(c) If so, whether CA informed Bala's lawyer of what CA was doing or intended to do with respect to SD2 and/or sought the consent of Bala's lawyer to do so;

(d) Whether CA had in any way verified or confirmed with Bala the contents of SD2 and that it reflects Bala's instructions, before it was signed by Bala;

(e) Whether CA had, prior to its signing, explained the contents and nature of SD2 to Bala;

(f) Whether CA had, prior to its signing, explained to Bala the consequences and risks involved of signing SD2;

(g) Whether CA satisfied himself that Bala understood the contents and nature of SD2, and understood the consequences and risks involved of signing SD2;

(h) Whether CA had ascertained or satisfied himself that Bala was not acting under duress in signing SD2 given the circumstances, including but not limited to an ongoing criminal trial at the time which SD2 and SD1 may have a bearing on, and that SD2 states that SD1 was signed under duress; and/or

(i) Whether CA had informed or advised Bala that he could and/or should obtain independent legal advice with respect to the contents and signing of SD2 prior to signing it.

4. CA is liable for misconduct within the meaning of Section 94(3) of the Legal Profession Act 1976 if it is found by the Disciplinary Board/Disciplinary Committee that CA drafted or was responsible for or involved in the drafting of SD2, and:

(a) Did not meet with or was not instructed by Bala with regard to the drafting of SD2;

(b) Knew or had reason to believe that Bala was at the material time represented by a lawyer with respect to matters addressed in or relating to or connected with SD2, but failed to inform Bala's lawyer that he had been instructed to draft SD2 for Bala to sign, and/or seek the consent of Bala's lawyer to do so;

(c) Failed to verify or confirm with Bala the contents of SD2 and that it reflects Bala's instructions;

(d) Failed to explain to Bala the contents and nature of SD2 and the consequences and risks involved of signing SD2, prior to its signing;

(e) Failed to satisfy himself that Bala understood the contents and

nature of SD2 and the consequences and risks involved of signing SD2;

(f) Failed to ascertain and/or satisfy himself that Bala was not acting under duress in signing SD2 given the circumstances;

(g) Failed to inform or advise Bala he could and/or should obtain independent legal advice with respect to the contents and signing of SD2 prior to signing it;

(h) Failed in all circumstances to discharge his duty to Bala as an advocate & solicitor notwithstanding that Bala may not be his client; and/or

(i) In all the circumstances, acted in a manner unbefitting of an advocate & solicitor or which brings or is calculated to bring the legal profession into disrepute, and/or failed to uphold the interest of justice and/or the dignity and high standing of the legal profession.

PROCEEDINGS BEFORE THE DISCIPLINARY COMMITTEE ('THE DC')

[15] The DC heard viva voce evidence of fourteen witnesses, including the President of the Bar Council and Malaysian Bar, Christopher Leong; the Secretary of the Bar Council and Malaysian Bar, Richard Wee; Tommy Thomas and Americk.

[16] Having considered the evidence, the DC recommended to the DB that the complaint be dismissed. In their report (Core Bundle Vol 3: p 868), each of the three members of the DC gave their reasons as to why they concluded that the complaint had not been proved beyond reasonable doubt.

[17] The Chairman, Mr Foo Kai Yuen made, inter alia, the following findings:

> I believe the big question mark that every body wants to know of SD 2 is who is the person who instructed the drafting of it and not so much as to who drafted it. The expectation is that with the identification of the person who drafted SD 2 there will be revelation as to who instructed him to draft it.
>
> At the outset I must stress that the purpose of the present inquiry is to find out whether the Respondent drafted or was involved in or responsible for the drafting of SD 2 and if so found then whether he had taken the relevant precautionary measures suggested by the Complainant. The purpose is not to find out who instructed the Respondent to draft SD 2.
>
> ...
>
> The first episode where the Respondent was present and involved is the after dinner

drinks at the Renaissance Hotel on 14-12-2012. Here it is alleged that the Respondent admitted to drafting SD 2. Tommy Thomas in his witness statement said that the Respondent admitted to drafting SD 2. On the other hand apart from the Respondent, who obviously denied making such admission, Daryl Goon, Foo Yet Ngo and Lim Chee Wee all denied what Tommy Thomas said. Their credibility, especially that of Foo Yet Ngo, was strenuously attacked by counsel for the Complainant. Without casting any aspersion on Tommy Thomas, in the face of the denials by the aforesaid three witnesses, even though such denials are in the forms of not remembering that the Respondent actually admitted, the benefit of the doubt is to be given to the Respondent.

The second episode of the Respondent being directly present and involved is the meeting between Americk Singh Sidhu, the Respondent and Saheran Suhendran Sockanathan on 28 February 2013.

[18] The Chairman considered the conflicting evidence of Americk and Socks and although he was reluctant to make a finding as to who was not telling the truth, stated that in the light of the evidence adduced, the threshold of proving its case beyond reasonable doubt had not been reached by the appellant. Accordingly he recommended that no cause for disciplinary action exists.

[19] A member of the DC, Mr Jadadish Chandra dealt extensively with the evidence and the law. Below are the relevant parts of his findings:

28. ... there is no direct evidence linking the Respondent to having 'drafted or was responsible for or was involved in the drafting of SD2'. I concede that circumstantial evidence may be looked at in an instance where direct evidence fails: see *Chan Chwen Kong v Public Prosecutor* [1962] 1 MLJ 307.

29. The relevant circumstantial evidence would be the role of the Commissioner for Oaths, Zainal Abidin bin Muhayat, who attested Bala's signature to SD2 on 4 July 2008 and is said to have an address of business at Suite 17.01, 17th Floor, Menara Pan Global, Lorong P Ramlee, Kuala Lumpur which is the same building at which the Respondent then had his office.

30. My answer to the question posed by the DB, to wit, whether the Respondent drafted or was responsible for or involved in the drafting of SD2 would, hence, be in the negative.

...

32. The burden of proof is on the Complainant, here the Bar Council. The standard of proof is beyond reasonable doubt; see *Hoo Lin Coln v Wong Weng Woh & Anor* [2007] 1 MLJ 56. I must stress that having considered the oral evidence of all witnesses and the written submissions of both parties, and their respective replies thereto, I find that there is insufficient evidence that the Respondent drafted, or was responsible for, or was involved in the drafting of SD2 by Balasubramaniam a/l Perumal on 4 July 2008 and hence I would recommend no cause of sufficient gravity for disciplinary action exists and the complaint be dismissed, see

A section 103C(1)(a) Legal Profession Act 1976.

[20] Having considered the report made by the DC on the complaint against the respondent, the DB, pursuant to s 103D of the Legal Profession Act 1976 ('the LPA'), ordered that the complaint be dismissed.

B

[21] Aggrieved, the appellant filed an appeal to the High Court seeking to set aside the order of the DB.

C FINDINGS OF THE HIGH COURT

[22] The learned judge observed that the appeal was brought against the findings of the DC and the DB which had to do solely with the credibility of witnesses on disputed matters of fact and that there was no contemporaneous D document to be considered.

[23] Her Ladyship reminded herself of the principle that in matters of professional discipline, the profession itself and its members are the best judge of what are the standards that the members of that profession must adhere to E and that the courts of law do not readily interfere with what the professionals see or do not see as misconduct. The following authorities were relied upon by the learned judge: *Gana Muthusamy v LM Ong & Co* [1998] 3 MLJ 341; [1998] 4 CLJ 878; *Marzaini bte Zainuddin v Majlis Peguam Negara* [2007] 8 MLJ 697; *Bolton v Law Society* [1994] 1 WLR 512 and *Chan Yiew Hock v Koh Hong Toong & Anor; Majlis Peguam (intervener)* [2010] MLJU 2229; [2011] F 4 CLJ 160.

[24] Her Ladyship also considered the direct and circumstantial evidence before coming to the conclusion that there was no reason to interfere with the G decision of the DC and the DB. The appellant's appeal was accordingly dismissed. Dissatisfied, the appellant appealed to this court.

THE APPEAL

H

[25] For the appellant, it was submitted that the DC/DB and the learned judge failed to critically evaluate the direct evidence and circumstantial evidence; failed to consider the motives behind the evidence given by the respondent's witnesses and failed to attach due weight to the evidence of I Tommy Thomas.

[26] Learned counsel for the appellant further submitted that the respondent had admitted on two occasions to drafting SD2 on the instructions of the Prime Minister. The first occasion was at the Renaissance Hotel and the

second occasion was during a meeting between the respondent, Americk and Socks.

[27] It was also the submission for the appellant that although there was little direct evidence in this case, there was a large body of circumstantial evidence which the High Court failed to consider. The High Court, it was submitted had also failed to consider the exception set out in the case of *Majlis Peguam v Dato Sri Dr Muhammad Shafee Abdullah* [2016] 5 MLJ 572. All these, according to the appellant, constituted an appealable error warranting appellate intervention.

[28] For the respondent, the gist of the submission in reply centered on the following issues: that the complaint involves an allegation of fact and issues of credibility of witnesses; that there were material discrepancies and inconsistencies in the evidence and that there was a complete lack of evidence adduced (or not adduced) by the appellant before the DC.

[29] The respondent had also raised a preliminary point that the complaint against the respondent was not a complaint within the meaning of the law, namely s 99 of the LPA; the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 and the Legal Profession (Disciplinary Proceedings) (Appeal) Rules 1994 ('the relevant Disciplinary Rules').

OUR FINDINGS

[30] Section 94(1) of the LPA provides that for purposes of all disciplinary actions, all advocates and solicitors shall be subject to the control of the Disciplinary Board, while s 99(1) provides:

> (1) Any complaint concerning the conduct of any advocate and solicitor or of any pupil shall be in writing and shall in the first place be made or referred to the Disciplinary Board which shall deal with such complaint in accordance with such rules as may from time to time be made under the provisions of this Part.

[31] Section 100 of the LPA provides for inquiry into a complaint and sub-s (1) speaks of 'Where a written application or complaint is made or referred to the Disciplinary Board, the Disciplinary Board shall, if it is satisfied that — ...'.

[32] In the relevant Disciplinary Rules, a 'complaint' is defined as follows: 'complaint means a written complaint concerning the misconduct of an advocate and solicitor or a pupil:'. Whereas the *Oxford Dictionary* defines complaint as:

1. An act of complaining.
2. A reason for dissatisfaction.
3. The expression of dissatisfaction; a letter of complaint.

[33] The disciplinary process as provided by the statutory scheme requires the DC to inquire or to investigate and to make findings of facts. For there to be an inquiry by the DC into a complaint, there has to be an actual complaint or a positive assertion as to the facts as opposed to a mere request for an inquiry by the DC to find out if there is some basis for a complaint.

[34] To recapitulate, the appellant's letter dated 4 April 2013 as expressed in its heading, was a complaint. Indeed that was the evidence of Christopher Leong, ie that the letter was regarded as a complaint. However, from the contents of the said letter, we found no actual complaint or allegation or assertion of any facts pointing to any misconduct of the respondent as such, in relation to SD2. There were no facts stated as to what the respondent had done or had omitted to do which constituted misconduct. Rather, by the said letter, the appellant was in effect seeking to obtain information. In other words, by the said letter, the DC was 'requested' to 'formally investigate' whether there is any basis for a complaint against the respondent.

[35] Understandably, no actual complaint or no specific assertion or allegation of misconduct could be made by the appellant against the respondent due to the very fact that the appellant itself had no knowledge of the allegation that the respondent had anything to do with SD2. Hence, as stated by Christopher Leong, the letter was a request for the DC to inquire into the allegation or to discover a series of facts which the appellant itself could not verify or had not verified on the following matters, which was the real complaint of the appellant:

> ... that SD2 was affirmed under duress. Bala never met with the lawyer who drafted it. The lawyer therefore never advised Bala as to the consequences of recanting SD1. Whether he understood those consequences and so forth. That would have been the complaint.

[36] We noted nonetheless that no questions were put to the respondent in cross-examination on the above matters. As such, those matters were taken to be abandoned by the appellant (see *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770 which followed *Browne v Dunn* (1893) 6 R 67). What was left therefore, to borrow the words from the case of *The Abidin Daver* [1984] AC 398, was more in the nature of a series of 'tenuous innuendoes' rather than a complaint.

[37] We were thus not convinced that the letter dated 4 April 2013 and its

appendices comprised a complaint within the meaning and purpose of s 99 read with ss 94 and 100 of the LPA and the relevant Disciplinary Rules. On that ground alone, the appeal could not be sustained as it is questionable whether there was a valid complaint. We will elaborate this point further below.

[38] We observe that the DB's powers to inquire into a written application or complaint under s 100 is necessarily confined to any complaint made under s 99. This is because the disciplinary process under the LPA may only be initiated by way of a complaint under s 99. The reference to a written 'application' in s 100 and the ensuing provisions are, for all intents and purposes, of no effect. It is both important and necessary that the jurisdiction and propriety of any disciplinary proceedings initiated under the LPA is properly reposed when examining whether a decision made by the DB in whom the LPA has entasked, may be upheld. We view this aspect of the matter before us with grave concern as part of the object of the discipline must be to ensure that the highest respect accorded to the legal profession is properly deserved. That may only be so where the DB has the necessary jurisdiction in the first place. These are our reasons for saying so.

[39] The LPA consolidated the law relating to the legal profession in Malaysia and this included repealing the then applicable Advocates and Solicitors Ordinance 1947. Under Part III of the 1947 Ordinance dealing with 'Control of Practitioners and Striking Off the Roll', an advocate and solicitor may be struck off on application by or complaint to the court.

[40] With the advent of the LPA, the courts no longer play a key role in matters of discipline of advocates and solicitors; it is now a matter of peer review. The court's role is confined to hearing appeals from any party aggrieved by the final order or decision of the DB — see 103E.

[41] Under s 95 of the original LPA, the disciplinary process started with a complaint, or in the case of the court or judge, with any information from the court or judge. In either case, the complaint or information may be directly referred to the Bar Council or to the relevant State Bar Committee. The Bar Council or the relevant State Bar Committee will then set into motion its internal mechanism of inquiry, findings and recommendations on the complaint or information by a DC assisted by an inquiry committee.

[42] Where the complaint is made to the State Bar Committee, the State Bar Committee is required to first determine whether a formal investigation by a DC is necessary, and notify the complainant of its decision. Where a complainant has not received such notice, the complainant may then apply to the Bar Council for the matter to be inquired into by the DC at the expense of and in place of the State Bar Committee concerned — see s 96(4). A

A complainant who has made such an application or complaint may then appeal to a judge of the High Court where the inquiry committee has determined that a formal investigation is not necessary — see 104(1). The term 'application' therefore has a very limited meaning, that it relates to an application by a complainant for a DC to be set up and this application is made to the Bar B Council after the State Bar Committee has decided that a formal investigation by a DC is not necessary.

[43] Sections 100(2) and 101(1)(a) of the original LPA fortify this reading. Under s 100(2), 'the applicant or person making the complaint and the C advocate and solicitor to whom the application or complaint relates' is empowered to, inter alia, summon and examine witnesses for the hearing before the DC.

D **[44]** Hence, the term 'application' relates to how the DC's jurisdiction is first invoked, whether directly on a complaint, or following an application by the complainant after the relevant State Bar Committee has made an adverse decision on the setting up of a DC.

E **[45]** Part VII of the LPA underwent several amendments:

(a) Act A367 with effect from 1 June 1977;

(b) Act A567 with effect from 16 December 1983;

(c) Act A812 with effect from 1 April 1992; F

(d) Act A861 with effect from 17 September 1993;

(e) Act A1269 with effect from 2 October 2006; and

(f) Act A1444 with effect from 3 June 2014.

G

[46] Vide Amending Act A567 of 1983, all complaints went to the Bar Council. It is then for the Bar Council to refer every complaint and every information referred to the relevant State Bar Committee. And, it is for the latter to investigate or inquire and report to the Bar Council on whether the H complaint or information should be referred to a DC for a formal inquiry. Where the State Bar Committee fails to report within three months from the complaint or information, the Bar Council is mandatorily required to refer to the inquiry committee.

I **[47]** This automatic process meant that the complainant is no longer required to apply to the Bar Council for the setting up of an inquiry committee, as was the case previously under the old s 96(4). Consistent with this new process, ss 100(2) and 101(a) were amended to cover only the circumstance of a 'complaint' — see the new ss 100(2)(a) and 101(1)(a).

[48] Now, ss 93 to 103, 103A to 103G of the LPA were again amended in 1992 vide Amending Act A812. The Amending Act saw the establishment of a DB exercising the functions of discipline that was previously held by the Bar Council — s 93. The old provision on complaints (s 95), albeit in substantially same terms, was now rehoused in the new s 99.

[49] When the DB receives a complaint, it is required to constitute an Investigating Tribunal — s 100. The functions of the Investigating Tribunal and the procedure it is required to follow are all spelt out in ss 101 and 102. Now, it is here at s 100 that the term 'application or complaint' is used. Given the backdrop of the amendments thus far, it would appear that the term 'application' serves no purpose let alone hold any meaning. Unfortunately, this incongruity was not picked up although the LPA underwent further amendments in 1993, 2006 and 2014.

[50] Consequently, the retention of the term 'application' in s 100 and the several provisions thereafter is misplaced. More so when there is s 99, upon which the whole disciplinary mechanism takes its force and where despite the numerous amendments, remains complaint based.

[51] Since the DB in fact lacked jurisdiction to hear any application, which is the real intent of complaint of 4 April 2013, the DB ought to have dismissed the 'complaint' in limine under s 100(1)(a) of the LPA.

[52] On the assumption that there was a valid complaint, the question for our determination was whether the learned judge in hearing the appeal from the decision of the DB failed to draw any conclusions from the circumstantial evidence adduced by the appellant.

[53] The circumstantial evidence is contained in the letter of 4 April 2013 and its appendices. It is the chronology of events and evidence in support of the complaint (see pp 1073–1180 of the appeal record). Learned counsel for the appellant expended considerable time highlighting the pre-complaint correspondence between the respondent's firm and the appellant, maintaining that the learned judge had not accorded sufficient weight to these letters. The thrust of these letters were direct queries from the appellant asking whether the respondent had any knowledge as to the preparation of SD2 and whether he was involved in the drafting or preparation of SD2.

[54] The reply from the respondent was that he was unable to divulge this information as solicitor-client privilege applies. It was then submitted that at the DC hearing the respondent effectively altered his stance by denying any involvement in the preparation of SD2. It was submitted that this amounted to a departure and constituted strong circumstantial evidence warranting an

irresistible inference that the respondent had in fact been involved in the preparation and/or drafting of SD2.

[55] The learned Chairman of the DC found that the respondent's reliance on solicitor-client privilege was puzzling until it was explained by the respondent in the course of the hearing that the respondent's firm had given advice on SD2, which warranted invoking solicitor-client privilege. In short the explanation as to the apparent change in stance was explained and accepted by the DC. We found no reason to intervene. While we agreed with the appellant that there may be no specific conclusions drawn on the circumstantial evidence by the High Court judge, we on our part, having examined the records found that the circumstantial evidence whether considered on its own or with the rest of the evidence, did not establish the misconduct complained of.

[56] We had also considered all the direct evidence on record and were of the view that there was insufficient evidence to meet the burden of proving the complaint of misconduct, to our minds, even on a balance of probabilities, let alone beyond reasonable doubt, the standard of proof to be met by the appellant (see *Lembaga Tatatertib Peguam-Peguam v Hoo Lin Coln & Anor* [2008] 4 MLJ 1; *Dinesh Kanavaji a/l Kanawagi & Anor v Ragumaren a/l N Gopal (Majlis Peguam, intervener)* [2018] 2 MLJ 265; *Campbell v Hamlet* [2005] 3 All ER 1116).

[57] Christopher Leong and Richard Wee provided no relevant or material evidence to support the appellant's complaint. They had no personal knowledge of the matter. Of significance however was the testimony of Christopher Leong where he said that 'I can tell you that I feel that even in this the BC is being used ...'. Christopher Leong further testified that (CB1: p 383):

> A: Mr Chairman, my feeling, now this is my personal feeling. I can't speak for the other members of the BC, my feeling is that I know that people who appear to have first hand knowledge of this, for example, Deepak or AS, they have not saw it fit themselves to file a complaint directly. In fact at the AGM and I am recalling this from memory, AS was specifically asked by someone from the floor that he should then proceed to file a police report and or a complaint. And AS addressed, took the microphone, and said no, that was not his intention that morning. His intention that morning was to reveal the client. That was what AS said. Therefore he categorically made it clear that he would not be filing a police report or a complaint. So in my mind, what that means is that there are certain parties more interested in knowing who is the person who instructed the lawyer to draft the statutory declaration. And therefore the lawyer is therefore really caught in the cross fire. It does not mean that the lawyer was not involved. Really the main interest

> was not in the lawyer. The main interest was in this case, the allegation was Najib. That it was Najib that instructed the lawyer. Therefore, the fact that the lawyer is allegedly Tan Sri is just secondary to that objective. ...

[58] The appellant's case rested essentially on the allegations made by Americk and the evidence of Tommy Thomas on the purported confession/admission made by the respondent that he drafted SD2.

[59] In respect of the purported admission made by the respondent at the Renaissance Hotel, apart from Tommy Thomas, there were eight other people present. Excluding the respondent, there were four advocates and solicitors in active practice, namely Dato' Johari Razak, Darryl Goon, Foo Yet Ngo and Lim Chee Wee. Granted, the appellant wrote to all of the advocates and solicitors present except Foo Yet Ngo. But none of the four were interviewed by the appellant nor called to testify before the DC.

[60] Darryl Goon, Foo Yet Ngo and Lim Chee Wee testified for the respondent and all of them disputed Tommy Thomas's version that the respondent admitted to the drafting of SD2.

[61] In so far as Dato' Johari Razak was concerned, in his letter dated 17 March 2014 to the appellant, he stated:

> I write to confirm that on 14 December 2012, I did have drinks with Tan Sri Cecil Abraham, Mr Tommy Thomas, Mr Darryl Goon, Mr Lim Chee Wee and their respective spouses.
>
> I also confirm that there was no discussion on SD2 or Tan Sri Cecil Abraham being involved in the drafting of SD2.

[62] The DC preferred the evidence of everyone else, including that of the respondent over the evidence of Tommy Thomas and Americk. We found no basis to intervene and no reason to depart. We certainly did not have the audio visual advantage that the DC enjoyed when deciding unanimously which witnesses' testimony they preferred. The circumstantial evidence in the form of chronological events and evidence ultimately found its way back to Deepak, who was never called to testify. Americk himself was not interested to lodge a complaint against the respondent as revealed in the minutes of the AGM (CB1: pp 123–124):

> Americk Singh Sidhu clarified his real agenda in respect of the entire issue. He said that right from the beginning, he had been interested not in Cecil Abraham but in finding out who had instructed the two policemen to murder and blow up Altantuya Shaariibuu. He was also not interested in lodging a report to BC or ASDB about what Cecil Abraham had done, since he had already achieved his objective by

way of first-hand information from Cecil Abraham as regards the identity of the person who had instructed Cecil Abraham to draft SD2. That was all Americk Singh Sidhu needed to know, as that was the agenda for which he had been engaged by Bala. ...

CONCLUSION

[63] To conclude, we found that the evidence against the respondent was inconclusive and largely hearsay and did not meet the required standard of proof. Given Christopher Leong's evidence that the mere drafting of SD2 itself is not a misconduct under the LPA and that the appellant was being 'used', and in the light of the real agenda of Americk in revealing the issue of SD2, we found that the evidence was unsafe to warrant a finding of misconduct within s 94 of the LPA against the respondent, even assuming for a moment that the drafting of the SD may amount to misconduct.

[64] We further found that this is not a rare case where the court is constrained to intervene to reverse the findings of the High Court which had affirmed the DB's decision. In our judgment, this case is not an exception as was found by the Federal Court in the case of *Dato' Sri Muhammad Shafee*.

[65] In *Dato' Sri Muhammad Shafee*'s case, the DC found that the respondent had breached the Legal Profession (Publicity) Rules 2001 and recommended that a fine of RM5,000 be imposed on the respondent. The DB and the High Court affirmed the findings of the DC. The respondent's appeal to this court was allowed. In affirming the decision of this court, the Federal Court through Raus Sharif PCA (as the CJ then was) said that unless the DC in the exercise of its powers can be shown to have erred in principle, or to have overlooked, misconceived, or disregarded some material matter of fact, or to have failed to act judicially, the court ought not interfere, except in the rarest of cases.

[66] It must be borne in mind that in the instant case, 20 members cumulatively of the DC and the DB who are the respondent's peers had found that no cause of disciplinary action exists against the respondent.

[67] As stated by the Federal Court in *Dinesh Kanavaji*, the court can only intervene where the findings are manifestly perverse; where the DC/DB had failed as right-thinking members of the Bar to give due consideration to the facts of the case and the conduct of the solicitors concerned; and where there had been a breach of natural justice. None of the above grounds were present in the instant appeal, hence we were not satisfied that the learned judge was plainly wrong in affirming the decision of the DB.

[68] In all these circumstances, we were unanimous in our view that the appeal should be, and was accordingly dismissed, with no order as to costs. A

Appeal dismissed with no order as to costs.

Reported by Dzulqarnain Ab Fatar B

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